APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals for the Ninth Circuit

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No. 14,978

Oct. 12, 1956

THE GRAY LINE COMPANY, a corporation, *Appellant*,
v.
R. C. GRANQUIST, District Director of Internal Revenue, *Appellee*.

Appeal from the United States District Court for the District of Oregon

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Before HEALY, POPE and LEMMON, Circuit Judges

LEMMON, Circuit Judge

Appellant corporation sued in the court below to recover taxes, penalties and interest paid appellee assessed under Section 3469 of the Internal Revenue Code of 1939, Title 26, United States Code. The suit followed a denial by appellee of appellant's claim for refund provided by Title 28 U.S.C. § 2411.

During the month involved here, July, 1950, appellant was engaged in the business of "transportation, sightseeing and airport transportation" for hire. One of its activities during that month consisted of the operation of a limousine service for airline passengers alighting from

or boarding planes of the Northwest Airlines, Western Airlines and Pan American World Airways between the airports and the downtown area of Portland, Oregon. For the purpose of this discussion we are assuming that only seven-passenger limousines were used. Except on one occasion, mentioned hereafter, on none of the trips were more than seven passengers carried. When not in use the limousines were kept in appellant's garage in Portland.

Under a contract between it and Northwest Airlines, appellant agreed to provide transportation by limousines for Northwest's passengers to and from Portland Airport and the City of Portland, and whenever Northwest's regularly scheduled flights originated or terminated at Troutdale Field, to provide such service between Troutdale and the City of Portland. Similar service was provided by appellant for passengers and employees of Western Airlines and Pan American World Airways.

The airline companies did not sell or issue tickets that included transportation to or from the airports on appellant's limousines. Their published schedules did not specify times for limousine service. Customarily, airline passengers on purchasing tickets for scheduled flights were asked by employees of the airlines whether they desired limousine service. When passengers desired such service arrangements were made as to where they would be picked up, usually at the offices of the airline or at a hotel, usually the Old Heathman, Multnomah or Benson. Passengers were also advised when and where in the downtown area the limousine would depart. The airline companies established the "pickup" points at places convenient to the passengers. Appellant did not pick up passengers other than at designated points, or along the route followed between the designated points or between the downtown area and the airports. Passengers from the airports were delivered at any place other than those designated in the downtown area if they were in the general direction of the

designated points, or at any place on the east side of Portland along the route taken.

Appellant did not have a dispatcher, and during the month in question employed four regular drivers and an extra driver. They worked in shifts and took turns in transporting passengers. The driver whose turn it was to make the next trip would telephone the airline company to ascertain the names of the passengers he was to take to the airports, the places where they were to be picked up, and the departure time of the airplane. He would then pick up the passengers at the places so designated and drive them to the airports. After unloading them he would ascertain from the airline when the next plane was to arrive, and, if the arrival time was within a reasonable interval and there were passengers aboard the plane who desired or might desire transportation from the airports to the city, he would wait until the plane arrived and was unloaded. If it appeared that no plane was due to arrive within a reasonable time carrying passengers who desired or might desire limousine service, he would return directly to appellant's garage.

If there was no limousine at the airport to meet an incoming plane and no limousine was to arrive with passengers in time to meet the incoming plane, appellant would send a limousine to meet the incoming plane, provided there were passengers thereon who desired or might desire limousine service. As a result, sometimes airplanes would arrive or leave the airports without limousines making any trips to the airports. The Portland Airport is approximately ten miles from downtown Portland. About eight hundred trips were made during July, 1950.

Appellant did not instruct its drivers as to the particular route to be traveled, but they always traveled in the general direction between the airports and downtown Portland. Weather and traffic conditions were factors which the drivers considered in selecting the streets over which

they traveled. Appellant did not post or print any schedules of its service and no public authority specified the route to be followed. The evidence further disclosed that approximately twenty-five percent of airline passengers used limousine service and that about ten percent of all flights were postponed by the airlines because of weather conditions.

Appellant's one-way charge for transportation to or from the airport was increased from eighty-five cents to one dollar for airline passengers by agreement with Northwest. The price charged by appellant in July, 1950, was one dollar for passengers and sixty cents for airline company employees. Limousine drivers collected these amounts from those using the service, except that charges for trips of airline crews based in cities other than Portland were billed to the airlines monthly. The drivers made a waybill for each trip or round trip and turned these in daily to appellant, together with the cash collected by them.

The Deputy Commissioner of Internal Revenue, by letter dated June 30, 1948, advised appellant that it was subject to the transportation tax.

The trial court found that the fares collected included the transportation tax; that the transportation tax was included in the charge made by appellant to its passengers and employees during the month of July, 1950; and that the burden of the tax was not borne by appellant. The books and records of appellant did not reflect the collection of the transportation tax from passengers as a tax obligation, although it did carry on its books and records an account showing tax liability for other transportation furnished by it.

The District Court found that the amounts assessed as penalty under Section 1718(c) of the Internal Revenue Code of 1939 and paid by appellant were not collected from its passengers.

The pertinent code sections[1] and Treasury Regulations[2] are set forth in the margin.

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[1] Sec. 1718. **Penalties:**

* * *

(c) Any person who willfully fails to pay, collect, or truthfully account for and pay over, any tax imposed by this chapter, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax evaded, or not paid, collected, or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected. No penalty shall be assessed under this subsection for any offense for which a penalty may be assessed under authority of section 3612.

* * *

(26 U.S.C. 1952 ed., Sec. 1718)

CHAPTER 30—TRANSPORTATION AND COMMUNICATION

Subchapter C—Transportation of Persons

Sec. 3469 [As added by Sec. 554(b), Revenue Act of 1941, c. 412, 55 Stat. 687] **Tax on Transportation of Persons, etc.**

(a) **Transportation.**—There shall be imposed upon the amount paid within the United States, on or after October 10, 1941, for the transportation, on or after such effective date, of persons by rail, motor vehicle, water, or air, within or without the United States, a tax equal to 15* per centum of the amount so paid. Such tax shall apply to transportation by motor vehicles having a passenger seating capacity of less than ten adult passengers, including the driver, only when such vehicle is operated on an established line.

(* The rate was increased to 15 percentum by Section 302, Revenue Act of 1943, c. 63, 58 Stat. 21)

* * *

(26 U.S.C. 1952 ed., Sec. 3469)

* * *

Sec. 3471 [As amended by Sec. 554(d) (2) of the Revenue Act of 1941, **supra**, and Sec. 620(b) of the Revenue Act of 1942, c. 619, 56 Stat. 798].

Refunds and Credits.

(a) Credit or refund of any overpayment of tax imposed by subchapter B, subchapter C, or subchapter E may be allowed to the person who collected the tax and paid it to the United States if such person establishes, to the satisfaction of the Commissioner under such regulations as the Commissioner with the approval of the Secretary may prescribe, that he had repaid the amount of such tax to the person from whom he collected it, or obtained the consent of such person to the allowance of such credit or refund.

(b) Any person entitled to refund of tax under this chapter paid or collected and paid, to the United States by him may take credit therefor against taxes due upon any monthly return.

(c) Any person making a refund of any payment on which tax under subchapter B, subchapter C, or subchapter E has been collected, may repay therewith the amount of tax collected on such payment,

The first point strenuously urged by appellant is that the court below erred in concluding that appellant's limousines were operated on an "established line". Vehicles, having a seating capacity of less than ten adult persons, come under the taxing statute only if the vehicles are "operated on an established line". Section 130.58 of the Regulations defining that term states that "operated on an established line" means operated with some degree of regularity between *definite points*. It does not necessarily mean that strict regularity of schedule be maintained." [Emphasis supplied] That the airports were definite points must be conceded; but appellant argues that there was no definite point in downtown Portland. It is to be noted, however, that the definition does not state "two definite points" but rather "definite points". The garage and the three hotels are definite points.

We conclude that the situation here presented comes within the definition. The facts here are essentially similar to those in Royce v. Squire, 73 F. Supp. 510 (W.D. Wash.), affirmed on other grounds, 168 F. 2d 250, where the court concluded that the taxpayer "operated on an established line". Likewise, the degree of regularity of operations between downtown Portland and the airports,

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and the amount of tax so repaid may be credited against the tax under any subsequent return.
(26 U.S.C. 1952 ed., Sec. 3471)

[3] Treasury Regulations 42 (1942 ed.):

Sec. 130.58 **Motor Vehicles with Seating Capacity of Less Than 10.**—

No tax is imposed on transportation by a motor vehicle having a seating capacity of less than 10 adult passengers, including the driver, unless such vehicle is operated on an established line. The term "operated on an established line" means operated with some degree of regularity between definite points. It does not necessarily mean that strict regularity of schedule is maintained; that the full run is always made; that a particular route is followed; or that intermediate stops are restricted. The term implies that the person rendering the service maintains and exercises control over the direction, route, time, number of passengers carried, etc. It implies also that the primary contract between the operator and the person served is for the transportation of the person and not for the hire or use of the vehicle.

as above depicted, brings the operations within the definition.

Furthermore, the administrative determination must govern where, as here, it is neither arbitrary nor unreasonable.[3]

The Treasury Regulations 42 were adopted in 1942, with substantially the same definition of "established line" which is found in earlier regulations. Congressional approval of the former regulations gives such regulation the force of law.[4] Further, since 1941 rates and substance in Section 3469 of the 1939 Code have been changed.[5] Congressional action was taken with knowledge of the definition given by the Regulations.[6]

Section 3471(a) of the Revenue Code of 1939 provides that a claim for refund of transportation taxes must be based on an erroneous collection, and that the claimant has borne the burden of the tax. The trial court's finding that appellant had not borne that burden is challenged as being contrary to the evidence. As heretofore noted, appellant had been notified by letter that the activities here depicted were within the statute. The one-way fare in effect was eighty-five cents per passenger and sixty cents per airline employee. Following August 21, 1949 the fare was increased to one dollar per passenger and this fare was in effect during July, 1950. There was one trip made during that year on account of which appellant concedes that $4 of transportation taxes were properly

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[3] Maryland Casualty v. U. S., 251 U.S. 342; Brewster v. Gage, 280 U.S. 327.

[4] Wilmette Park Dist. v. Campbell, 338 U.S. 411, 417-418; Crane v. Commissioner, 331 U.S. 1, 7-8; Helvering v. Reynolds Co., 306 U.S. 110, 114-115; Helvering v. Winmill, 305 U.S. 79, 82-83.

[5] Section 609 of the Revenue Act of 1942, c. 619, 56 Stat. 798; Section 302(a) of the Revenue Act of 1943, c. 63, 58 Stat. 21; Section 2, Joint Resolution of March 31, 1949, c. 46, 63 Stat. 30; Section 607 of the Revenue Act of 1950, c. 994, 64 Stat. 906; Section 494 of the Revenue Act of 1951, c. 521, 65 Stat. 452; Section 504(a) of the Excise Tax Reduction Act of 1954, c. 126, 68 Stat. 37.

[6] Mass. Mutual Life Ins. Co. v. United States, 288 U.S. 269; Helvering v. Reynolds Co., supra; Crone v. Commissioner, supra.

assessed, because on that occasion twenty-four persons were transported and each was charged one dollar. The same one dollar charge was made during July, 1950 for limousine transportation. The court below concluded that appellant likewise passed on to the passenger the tax through the increase in the fare.

The Royce case, supra, is quite similar, though there the increase in fare was made immediately after the transportation tax was increased. There the drivers notified the passengers that the fares included the taxes and the tax collected was kept segregate upon the company's books, while here the increase in rates was made approximately a year after receiving the notice from the Revenue Service. No word was given passengers that the fare included the tax, and appellant maintained no tax liability account on its books but included the entire fare as income. But, as observed by the trial court, there are two significant circumstances here, (1) the charge for rides on the bus was concededly not exempt from the transportation tax, and was the same as the fare charged to the passengers using the limousine service; and (2), the fares were raised in amount approximately equal to the tax. The inference was for the court to draw. It is reasonable and we conclude that it is supported in the evidence.

The Collector assessed and collected a penalty, and the Court approved such collection and assessment. Section 1718(c) provides that a taxpayer who willfully fails to collect and pay any tax imposed by the chapter shall be charged a one hundred percent penalty. The judge concluded that appellant acted willfully in failing to pay over the taxes. That this failure was intentional is apparent. However, appellant had been advised by competent counsel and by a Special Deputy Tax Collector in the Collector's office in Portland that it was not required to pay the tax. It relied and acted upon this advice.

Appellee would spell willfulnes out of appellant's failure to comply with the demand in the letter of June 30, 1948.

Appellant, however, in relying upon the advice given to it rather than upon the interpretation contained in the letter, does not show willfulness. Appellant's position was not arbitrary or unreasonable. This litigation and the long period of negotiation between appellant and the Commissioner preceding this action indicate this. Appellant acted in good faith and had reasonable cause to contest. We conclude that it did not act willfully.

The cause is remanded to the District Court with direction to enter judgment for the one hundred percent penalty paid by the appellant to appellee. Otherwise the judgment is affirmed.

(Endorsed:) Opinion. Filed, Oct. 12, 1956.

PAUL P. O'BRIEN, Clerk.

APPENDIX B

Judgment of the United States Court of Appeals for the Ninth Circuit

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Appeal from the United States District Court for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that this cause be, and hereby is remanded to the said District Court with direction to enter judgment for the one hundred percent penalty paid by the appellant to appellee. Otherwise, the judgment be, and hereby is affirmed.

(Endorsed) Judgment

Filed and Entered: October 12, 1956

PAUL P. O'BRIEN, Clerk.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, November 20, 1956.

Before: HEALY, POPE and LEMMON, Circuit Judges.

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellant, filed November 9, 1956, and within time allowed therefor by rule of Court for a rehearing of the above cause be, and hereby is denied.

APPENDIX D

Opinion of the United States District Court for the District of Oregon

[Title of District Court and Cause.]

Opinion

June 24, 1955.

Solomon, Judge:

There is no need for reviewing the facts in this case. They are similar to those outlined in Royce, et al. v. Squire, Collector, 73 F. Supp. 510 (D.C. Wash. 1947).

I find that the interpretation [Treas. Regs. 42 (1942 Ed.) § 130.58] given to § 3469, as amended, Int. Rev. Code of 1939, 26 USCA § 3469, by the Commissioner, is a proper one and does not unduly expand the meaning of the statute. Similar interpretations have been made by the Com-

missioner over a period of many years, and during that time the law was re-enacted and amended. Under the doctrine of contemporaneous construction, the Commissioner's interpretations, even though not controlling upon the courts, are entitled to respect. When, as here, Congress re-enacted this section with knowledge of the construction placed upon it by the Commissioner, the official charged with its administration, the failure of Congress to have changed the interpretation placed upon it by the Commissioner requires the conclusion that the regulation is not inconsistent with the intent of the statute. Mass. Mutual Life Ins. Co. v. U.S., 288 U.S. 269, 273.

There is no merit to plaintiff's contention that the service which it furnished was either irregular or not at fixed points. Plaintiff's service was supplemental to the air service, and was irregular only to the extent that inclement weather and other conditions postponed or cancelled air travel. The company and not the passengers determined the pick-up points in downtown Portland and the routes between such pick-up points and the airport.[1]

I, therefore, find that the Commissioner properly determined that plaintiff's activities were subject to the transportation tax.

I also find that the Commissioner properly assessed a penalty against plaintiff for its failure to pay such tax. More than two years prior to the period for which this tax was assessed and collected, the Deputy Commissioner, after reviewing plaintiff's airport operations, rendered a decision in which he found that they were subject to transportation taxes. No penalty was assessed at that time, but plaintiff was warned that unless such taxes were collected and paid in the future, the penalty would be imposed. The prior statements of a local Special Deputy

[1] Of almost 800 trips made during the month, all but four were clocked at within one mile of the 10-mile run that the drivers testified was the distance between the airport and downtown Portland with no intermediate stops.

Tax Collector and the opinion of taxpayer's lawyer are not sufficient to overcome the Commissioner's ruling.

Plaintiff, as a subsidiary point, contends that the language of the penalty provision is such as to make the total amount of recovery, including the penalty, limited to the amount of the tax which plaintiff should have collected and paid. There is no merit in this contention.

Lastly, in the case of Royce, et al. v. Squire, Collector, 168 F.2d 250, the Court of Appeals affirmed the judgment of the trial court on the ground that the plaintiff was not the real party in interest because it was the passengers and not the plaintiff who paid the tax. In order to avoid the force of that decision, the plaintiff now contends that it, rather than the passengers, paid the tax. It is significant, however, that the price charged for rides on the bus, which rides were admittedly not exempt from the transportation tax, was the same as the fare charged to the passengers using the limousine.

It is also significant that shortly after the Deputy Commissioner ruled that plaintiff was subject to the transportation tax, the fares were raised from 85 cents to $1.00. In my view the tax was included in the fares paid by the passengers.

Attorneys for the Commissioner may prepare findings of fact, conclusions of law, and judgment in favor of the defendant in accordance with this memorandum opinion.

[Endorsed]: Filed June 24, 1955.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 768

THE GRAY LINE COMPANY, A CORPORATION, PETITIONER

v.

R. C. GRANDQUIST, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court's opinion (R. 32–34) and its findings of fact and conclusions of law (R. 42–51) are not officially reported. The opinion of the Court of Appeals (Pet. App. 1a–9a) is reported at 237 F. 2d 390.

JURISDICTION

The judgment of the Court of Appeals was entered on October 12, 1956. (Pet. App. 9a.) Petitioner's motion for rehearing was denied on November 20, 1956. (Pet. App. 10a.) The petition for a writ of certiorari was filed on February 11, 1957. The juris-

diction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the courts below were correct in holding that petitioner failed to establish as a fact that it bore the burden of the Federal transportation tax so as to entitle it to a refund of any overpayment of the tax under Section 3471 (a) of the Internal Revenue Code of 1939.

2. Whether the courts below were correct in holding that petitioner's motor vehicles were "operated on an established line" within the meaning of Section 3469 (a) of the Internal Revenue Code of 1939, so that fares collected by petitioner were subject to the Federal transportation tax.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

CHAPTER 30—TRANSPORTATION AND COMMUNICATION

* * * * *

SUBCHAPTER C—TRANSPORTATION OF PERSONS

SEC. 3469[1] [As added by Sec. 554 (b), Revenue Act of 1941, c. 412, 55 Stat. 687].

TAX ON TRANSPORTATION OF PERSONS, ETC.

(a) *Transportation.*—There shall be imposed upon the amount paid within the United States,

[1] The rate was increased to 15 percent by Section 1650 of the Internal Revenue Code of 1939 which was added by Section 210 of the Revenue Act of 1940, c. 419, 54 Stat. 516, and amended by Section 802, Revenue Act of 1943, c. 63, 58 Stat. 21.

on or after October 10, 1941, for the transportation, on or after such effective date, of persons by rail, motor vehicle, water, or air, within or without the United States, a tax equal to 15 per centum of the amount so paid. Such tax shall apply to transportation by motor vehicles having a passenger seating capacity of less than ten adult passengers, including the driver, only when such vehicle is operated on an established line.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3469.)

SEC. 3471 [As amended by Sec. 554 (d) (2) of the Revenue Act of 1941, *supra*, and Sec. 620 (b) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. REFUNDS AND CREDITS.

(a) Credit or refund of any overpayment of tax imposed by subchapter B, subchapter C, or subchapter E may be allowed to the person who collected the tax and paid it to the United States if such person establishes, to the satisfaction of the Commissioner, under such regulations as the Commissioner with the approval of the Secretary may prescribe, that he has repaid the amount of such tax to the person from whom he collected it, or obtained the consent of such person to the allowance of such credit or refund.

(b) Any person entitled to refund of tax under this chapter paid, or collected and paid, to the United States by him may take credit therefor against taxes due upon any monthly return.

(c) Any person making a refund of any payment on which tax under subchapter B, subchapter C, or subchapter E has been collected, may repay therewith the amount of tax collected on such payment, and the amount of tax so repaid may be credited against the tax under any subsequent return.

(26 U. S. C. 1952 ed., Sec. 3471.)

Treasury Regulations 42 (1942 ed.):

SEC. 130.58. *Motor Vehicles with Seating Capacity of Less Than 10.*—No tax is imposed on transportation by a motor vehicle having a seating capacity of less than 10 adult passengers, including the driver, unless such vehicle is operated on an established line. The term "operated on an established line" means operated with some degree of regularity between definite points. It does not necessarily mean that strict regularity of schedule is maintained; that the full run is always made; that a particular route is followed; or that intermediate stops are restricted. The term implies that the person rendering the service maintains and exercises control over the direction, route, time, number of passengers carried, etc. It implies also that the primary contract between the operator and the person served is for the transportation of the person and not for the hire or use of the vehicle.

STATEMENT

The relevant facts, as found by the District Court (R. 42-50), and by the Court of Appeals (Pet. App. 1a-4a), may be summarized as follows:

During July 1950, petitioner was engaged in the business of transporting passengers by motor vehicle. One of its activities consisted of the operation of a limousine service for airline passengers and employees between the airports and the downtown area of Portland, Oregon. This service was provided by a fleet of six seven-passenger limousines. On none of the trips made by limousine were more than seven adult passengers carried; one trip during the month was made by a bus owned by petitioner, which had a seating capacity of more than ten passengers. (R. 44–45.)

Under a contract between petitioner and Northwest Airlines, petitioner agreed to provide transportation by limousines for airline passengers to and from Portland Airport and the City of Portland, or, when the flights originated or terminated at Troutdale Field, to provide similar service between Troutdale and the City of Portland. Petitioner also provided similar transportation service for passengers and employees of Western Airlines and Pan American World Airways. (R. 44.)

The airline companies did not sell or issue tickets which included transportation to or from the airports in petitioner's limousines. Their published schedules did not specify times for limousine service. Customarily, airline passengers, upon purchasing tickets for scheduled flights, were asked by employees of the airlines whether they desired limousine service. When passengers desired such service, arrangements were made as to where they would be picked up (which was

usually at the offices of the airlines or at one of three hotels). The airline companies established the pick-up points at places convenient to the passengers. Petitioner did not pick up passengers other than at designated points or along the route between the downtown area and the airports. Incoming passengers from the airports were delivered at places other than those designated in the downtown area, provided such places were in the general direction of the designated points or on the east side of Portland along the route taken. (R. 45–46.)

During July 1950, petitioner did not have a dispatcher. It employed four regular drivers and an extra driver, who worked in shifts and took turns in transporting passengers. The driver, when his turn came, would telephone the airline company to ascertain the names of the passengers he was to take to the airport, the places where they would be picked up and the departure time of the airplane. He would then pick up the passengers at the places so designated and drive them to the airport. After unloading them, he would ascertain from the airline when the next airplane was due to arrive, and, if the arrival time was within a reasonable interval and it appeared there would be passengers aboard who might desire transportation from the airport, he would wait until the airplane arrived and was unloaded. Otherwise, the driver would return directly to petitioner's garage. (R. 46–47.)

If there was no limousine at the airport to meet an incoming airplane, and if no limousine was to arrive in time to meet it, petitioner would send a limousine

provided there were passengers thereon who desired or might desire limousine service. At times, airplanes would arrive or leave the airports without limousines making any trips to or from the airports. (R. 47.)

The Portland airport is approximately ten miles from downtown Portland. Approximately eight hundred trips were made during July 1950. (R. 48; Pet. App. 11a.)

Petitioner did not instruct its drivers as to the particular route to be followed, but the route selected was always in the general direction of the airports or of downtown Portland. Weather and traffic conditions were factors which the drivers considered in selecting the streets over which they travelled. Petitioner did not post or print any schedule of its service and no public authority specified the route to be followed. Approximately 25% of the airline passengers used limousine service and approximately 10% of all flights were postponed by the airlines because of weather conditions. (R. 48–49.)

Petitioner's one-way charge for transportation to and from the airport was increased in August, 1949, from eighty-five cents to one dollar for airline passengers. This was the price charged during July 1950. The price charged for airline company employees was sixty cents, which was also the pre-1949 figure. Limousine drivers collected these amounts from persons using the service, except that charges for trips of airline crews based in cities other than Portland were billed to the airlines monthly. The

drivers made a waybill for each trip or round trip and turned these in daily to petitioner, together with the cash collected by them. (R. 48–49.)

The District Court found that the fares collected by petitioner for transportation of airline passengers and employees during July 1950, included the transportation tax, and that the burden of the tax was not borne by petitioner. Petitioner's books and records did not reflect the collection of the transportation tax from passengers as a tax obligation, although petitioner did carry on its books and records an account showing tax liability for other transportation furnished by it. The District Court also found that the limousine service provided by petitioner was operated with a degree of regularity between definite and fixed points and was irregular only to the extent that inclement weather and other conditions postponed or cancelled air travel. (R. 49–50.) The District Court concluded that during July 1950, petitioner operated its limousines on an established line within the meaning of Section 3469 of the 1939 Code, thus making itself subject to tax; and that the fares charged by petitioner included the tax, so that, in any case, petitioner had not established that it bore the burden of the tax, as required by Section 3471 of the 1939 Code. (R. 50–51.) The Court of Appeals affirmed. (Pet. App. 6a–9a.)

ARGUMENT

1. In order to qualify for a refund of transportation taxes under Section 3471 (a) of the Internal Revenue Code of 1939, *supra*, pp. 3a–4a, a claimant must

establish not only that the tax was erroneously collected, but also that he bore the burden of the tax.[5] *Royce* v. *Squire*, 168 F. 2d 250 (C. A. 9th); *United States* v. *Walls*, 231 F. 2d 440 (C. A. 5th). See *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 397–400; *Sharp & Dohme* v. *United States*, 144 F. 2d 456 (C. A. 3d). This question is one of fact. *United States* v. *Walls*, *supra*. See also *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337. The District Court below found as a fact (R. 49), and the Court of Appeals affirmed (Pet. App. 7a–8a), that the transportation "tax was not paid from * * * [petitioner's] own funds but the tax was 'passed on' and collected from its passengers." Concurrent findings of the lower courts are final in the absence of exceptional showing of error. *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275, affirmed on rehearing, 339 U. S. 605; *Comstock* v. *Group of Investors*, 335 U. S. 211, 214; *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590, 605. Here, petitioner has failed to show any error in the findings below.[6]

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[5] A claimant might recover under Section 3471 (a) if he showed that he repaid the tax to the person from whom he collected it, or that he obtained the consent of such person to sue for the refund. Neither of these positions was asserted or proved below by petitioner.

[6] On the contrary, the record clearly supports the findings of the courts below. For example, petitioner was notified in June 1948, that its limousine operations were subject to the tax (R. 99–101); it increased its fares to its passengers from eighty-five cents to one dollar in August 1949, when the rate of tax was 15% (R. 49, 80, 99, 103); and it charged the same price to its passengers for transportation by bus, which ad-

2. While it is unnecessary to go beyond the point discussed immediately above in order to demonstrate the correctness of the judgment below, we believe that the decision was correct in other respects as well.

Section 3469 (a) of the Internal Revenue Code of 1939, *supra*, pp. 2–3, imposes a tax upon amounts paid within the United States for transportation of persons by rail, motor vehicle, water or air. With respect to transportation by motor vehicles having a seating capacity of less than ten adult passengers, the tax is applicable only if the vehicles are "operated on an established line." This term has consistently been interpreted by the applicable Treasury Regulations (see Section 130.58 of Treasury Regulations 42, *supra*, p. 4) to mean some degree of regularity of operations between definite points, but not necessarily to mean that "strict regularity of schedule is maintained; that the full run is always made; that a particular route is followed; or that intermediate stops are restricted." See also Article 39 of Treasury Regulations 49 (1919 ed.). The court below found that the airports and the pick-up points in the downtown area of Portland, *i. e.*, the airline offices, the three hotels and petitioner's garage, were definite points. Additionally, the court

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mittedly was not exempt from the tax, which it charged to its limousine passengers (R. 81–82).

The District Court also found that the Commissioner properly assessed and collected a penalty against petitioner under Section 1718 of the 1939 Code for wilful failure to collect and pay over the transportation tax. (R. 49–50.) The Court of Appeals, however, held that petitioner did not act wilfully, and that it was not liable for the penalty in addition to the tax and interest. (Pet. App. 8a–9a.)

below found that there was a sufficient regularity of operations beween downtown Portland and the airports—some eight hundred trips during July 1950—to bring petitioner's limousine operations within the scope of the tax. (R. 50; Pet. App. 6a–7a, 11a.) This holding is correct and is in accord with the only other decision construing this particular provision of the statute and the Regulations. *Royce* v. *Squire*, 73 F. Supp. 510 (W. D. Wash.), affirmed on other grounds, 168 F. 2d 250 (C. A. 9th).

Petitioner contends (Pet. 12–14) that the courts below ignored a revenue ruling, Rev. Rul. 54–47, 1954–1 Cum. Bull. 269, which is inconsistent with the result reached. However, there is no conflict between Rev. Rul. 54–47, *supra*, and the decision below. The ruling exempts from the transportation tax certain operations where the passengers, rather than the limousine operator, exercise control over the direction, route, etc., taken by the limousines, and the limousine operator picks up and delivers passengers at any place or places designated by them, as distinguished from fixed pick-up and discharge points. In the present case, it is clear that petitioner, rather than its passengers, exercised control over the airport limousine operations and determined the pick-up points and routes between these points and the airports. (R. 24–25, 70–72, 76–77, 83–84, 88.)

Nor has petitioner substantiated its claim (Pet. 14–16) that the decision below, in determining what constitutes "an established line" within the meaning of Section 3469 (a) of the 1939 Code, is likely to

cause an increasing amount of litigation. As petitioner admits (Pet. 15), this clause of the statute has been the subject of only one other reported case since its enactment. That case is in accord with the decision here.

CONCLUSION

The decision below is correct. In any event, it turns upon the particular facts of this case and is not of general importance. There is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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